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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 393

GEORGE PAPE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

George Pape, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on August 7, 1944.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (Clark and Swan, Circuit

Judges, affirming conviction, L. Hand, Circuit Judge, dissenting) is not as yet reported.

JURISDICTION.

The order for mandate of the United States Circuit Court of Appeals for the Second Circuit was entered August 7, 1944 (R. 362). The statutory provision believed to sustain the jurisdiction of this Court is § 240 (a) of the Judicial Code as amended. See also Rule XIII of the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934. Excluding Sundays (Aug. 13-20-27; Sept. 3-10) time for filing the petition extends to Sept. 11, 1944.

QUESTIONS PRESENTED.

1. Can a United States District Court, without committing error, submit and leave to a trial jury, an alternative theory, that the evidence did not justify, where one is being tried for a violation of Title 18, Section 398 United States Code?

2. Do the Federal Courts in the trial of the criminal case compel an attorney for defendant to testify to confidential and privileged communications?

STATUTE INVOLVED.

Title 18, Section 398 of the United States Code, provides as follows:

> "§ 398: Transportation of woman or girl for immoral purposes, or procuring ticket. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purposes of prostitution or debauchery, or for any other immoral purpose. * * *

shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."

STATEMENT.

Petitioner was indicted in the United States District Court for the Southern District of New York, for an alleged violation of Title 18, United States Code, Section 398; was convicted and sentenced; the judgment was affirmed by the Court below, Circuit Judge L. Hand dissenting.

Petitioner, a resident of New York City, had known a woman named Barbara Jorman for many months, who was the woman alleged in the indictment to have been transported by automobile from New York City to Washington, District of Columbia on or about July 11, 1942 "for the purpose of prostitution, debauchery and other immoral purposes". The so-called victim was taken to jail in Washington by a policeman, no charges were filed against her and she was released; some few weeks later picked up again by a policeman, no charges and again released.

The "victim", the woman named in the indictment, after the petitioner was arrested April 26, 1943 (R. 255) by a Federal Bureau of Investigation Agent in his hotel in New York City without a warrant, almost a year after the alleged offense, was placed under bond by the government as a material witness. During the course of the six day trial of the petitioner, the material witness was in constant attendance of the Court, the district attorney paraded before the jury no fewer than a score of witnesses to identify her; as having seen her with the petitioner; some of her bad practices and her association with some women who practiced a profession as old as the ages; she was held as a material witness and the person who could prove the alleged crime and assist the jury in arriving at a proper

verdict but was not called by the prosecutor. There was no direct testimony that the petitioner was guilty of the crime charged, other than from sources not worthy of belief; (R. 175), such as the testimony of a self-confessed criminal who had his sentence of two years cut down to ten months, released June 10, 1943 and testifying in the case under discussion, the first part of August 1943; a witness forty-four years of age, who under his own testimony (R. 185) admitted he had lived a life of crime for ten years. The petitioner properly requested the Court to call the material witness but this request was refused (R. 310) which refusal was an abuse of the Court's discretion it is contended. Court in his charge to jury (R. 321) referred to her as a witness.

The prosecution called as a witness an attorney of Washington who petitioner had consulted and employed and who assisted in the release of the woman in the case (R. 216), when she was taken in custody by a Washington police officer. There is a great deal of testimony to the effect that the woman was released in the custody of the petitioner's attorney, but such "custody" is foreign to any principles of criminal law. The testimony of this lawyer witness was strenuously objected to by the petitioner, the trial Court ruled one way, then changed after insistence by the prosecutor that such testimony was proper and apparently felt as if it were essential and necessary to complete a chain of circumstantial evidence to convict the petitioner. The petitioner's attorney who, as claimed, was a privileged witness and should not have been compelled to testify against his client in matters undoubtedly considered very material by the jury, placed the petitioner in Washington at a time that was material and in a Packard automobile as alleged as the means of transportation; which testimony was necessary to fortify the testimony of the hotel clerk Meridith who was considerably confused as shown on cross examination (R. 96).

Agent Rumans of the Federal Bureau of Investigation was by the Court permitted to testify over the objections of the petitioner to certain things alleged to have been said by the petitioner (R. 254-255); this testimony is not corroborated, although the witness (R. 276) stated "A. We questioned him, the *agents* and myself questioned him." The petitioner was picked up at his apartment at 11 o'clock, held in custody by the agent in the Federal Building on the 29th floor until 4:30 o'clock in the afternoon when he was arraigned. This testimony should not have been admitted in evidence, confusing as it is, undoubtedly was taken into consideration with great weight by the jury.

Considerable testimony was offered and received in evidence that the "victim" had been seen in a hotel of questionable character in Saratoga Springs, New York (R. 237) August, 1941, a year before the alleged crime as charged in the indictment; also petitioner had dinner there one night; testimony that was undoubtedly prejudicial to the defense of the petitioner but entirely remote and foreign to the charge of which he stands convicted; which conviction is based mostly upon such prejudicial testimony and a weaving of circumstances that injured him in the minds of the jury, but failed to prove the offense as charged (R. 230) (R. 247).

A Packard car operated by the petitioner obtained a considerable amount of attention when the government produced witnesses relative to the purchase of the same, servicing of the same, seeing baggage put in the car at times, seeing it parked where petitioner lived in New York, but without further proof the jury should not be permitted to consider it a "robot" machine loaded in New York and ending up in Washington later, as there is no proof the petitioner drove the same to Washington.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred, as follows:

1. In sustaining the judgment of conviction.

2. In failing to reverse the judgment of conviction for failure of the District Court to grant the motion for directed verdict on grounds of insufficient evidence (R. 309).

3. In failing to reverse the judgment of the District Court for its error in overruling defendant's motion in arrest of judgment (R. 340).

4. In failing to reverse the judgment of the District Court for its error in admitting improper evidence.

5. In failing to reverse the judgment of the District Court for its error in improperly instructing the jury (R. 332).

6. In failing to reverse the judgment of the District Court in a papable abuse of discretion in failing to call the material witness to testify before the Court and jury.

7. In failing to reverse the judgment of the District Court in permitting Government agents' prejudicial statements taken from petitioner in their custody and before arraignment.

REASONS FOR GRANTING THE WRIT.

I.

Can a United States District Court, without committing error, submit and leave to a trial jury, an alternative theory, that the evidence did not justify, where one is being tried for a violation of Title 18, Section 398 United States Code?

Petitioner is not guilty as charged and now stands convicted. The facts are set out in the statement, *ante*. Even if the theory upon which this prosecution proceeded

were proven correct, the trial Court erred in its alternative theory as submitted to the jury. The purpose of the testimony of the police Sergeant Blickt of Washington; other witnesses from Washington and the Homestead Hotel in Saratoga Springs, New York, was that the woman was a prostitute and the petitioner transported her for the purposes of prostitution and not that the petitioner unlawfully cohabited with the "victim" in New York State or Washington. In submitting the case to the jury, the Court said:

> "Any immoral purpose, in this case, would include, not merely that the woman when she had been transported to Washington, if you find that she was so transported, should enter into sexual relations for a consideration promiscuously with men. The immoral purpose stated in the statute would cover also the interest of the person transporting or causing her to be transported to have himself immoral relations with her, such as sexual relations, if the parties were not legally married. * * * And as I told you, those immoral practices might include sexual relations with the person transporting her, if that person was not legally married to the woman." (R. 323).

Petitioner's counsel took exception to that part of the Court's instruction upon the ground that the case was tried as one exclusively involving commercialized vice and that no claim had ever been advanced that petitioner intended to himself engage in any immoral relationship with her.

The following colloquy then ensued:

> "The Court: I think the law is clear that the immoral purpose may include unlawful and illegal sexual relationship between the defendant transporting the woman, and the woman herself. That is what I have told the jury.
>
> "Mr. Singer: But your Honor may not submit the case on a theory not taken by the Government during the trial.

> "I except to the refusal of the Court to charge request No. 9.
> "The Court: That is covered in the general charge." (R. 332).

Petitioner's request No. 9 was pertinent to the issues presented, and it was error to refuse to so instruct the jury:

> "9. Guilt may not be found merely because the defendant and Miss Jorman were registered at a hotel in Washington as man and wife. It is still necessary for the Government to prove beyond a reasonable doubt that the defendant intended to have Miss Jorman commit acts of prostitution in Washington and that the transportation was for that purpose." (R. 317).

The Court advanced a new theory, in its charge; no such proof was attempted, nor was there anything before the jury that would justify a finding that they were not legally married. Nor was there any proof offered to the effect that petitioner had actually occupied the room in Houston Hotel in Washington, and there engaged in any immoral practice. In fact, Sergeant Blicht's testimony is indicative of the contrary since he found no man's clothing in the room (R. 163).

In *Pincolini* v. *United States,* 9 Cir., 295 Fed. 468, the Court declared (at p. 470):

> "In charging the jury the Court should not assume facts in controversy; if the testimony is stated, it should be stated with accuracy; that which makes in favor of the party should be stated as well as that which makes against him; *theories should not be advanced or conclusions drawn that are not warranted by the testimony;* the charge should not be argumentative or one-sided; and the Court should not step out of the province of judge into that of the advocate. *Starr* v. *United States,* 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 814, and cases there cited." (Italics ours)

The Supreme Court, in *United States* v. *Breitling,* 20 How. 252, 254, in an opinion by Mr. Chief Justice Taney, said:

> "It is *clearly error in a Court to charge* a jury upon a *supposed or conjectural* state of facts of which *no evidence has been offered.* The instruction pre-supposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the Court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony." (Italics ours)

The practice of the trial Court was condemned by this Court in an opinion by Mr. Chief Justice Hughes, in *Quercia* v. *United States,* 289 U. S. 466, wherein it was quoted at page 470, "Deductions and theories not warranted by the evidence should be studiously avoided."

The alternative theory advanced by the Court was unfounded and unwarranted by the evidence, and neither attorney tried the case upon such a theory. The opinion of the Circuit Court of Appeals (R. 365) referring to civil procedure under no circumstances is the law of the land in criminal cases, and is not in accord with opinions in other Circuits or the law as laid down by this Court. Circuit Judge Hand, dissenting in this case, observed the error of the trial Court and the injustice done the petitioner, when he states (R. 370):

> "Moreover, I do not believe the evidence justified a conviction on the alternative theory which the judge left to the jury. * * * Only the purpose for which he took her from New York to Washington, was relevant; and, while it is conceivable that the trip may have been in part actuated by the purpose of continuing to enjoy her as he had been doing, *that seems to*

me too doubtful to justify a conviction—the merest speculation.'' (Italics ours)

Regardless of the nature of the alleged offense, as charged, this petitioner was entitled to be tried as any other defendant in a criminal case; he was not; this petition for Writ of Certiorari should be allowed. The law as laid down by this Court is as announced by Circuit Judge L. Hand in the dissenting opinion. If the majority opinion in the Court below is allowed to stand in this case, it is in conflict with the law announced by the Ninth Circuit as well as the Supreme Court of the United States.

II.

Do the Federal Courts in the trial of a criminal case compel an attorney for defendant to testify to confidential and privileged communications?

M. Edward Buckley, an attorney admitted to practice in the District of Columbia, having been called by the Government as a witness, advised the Court, in the absence of the jury, that on or about July 15th, 1942, he was retained by petitioner to represent himself and the material witness, and that, therefore, a question of confidential communication between attorney and client was involved in the matters on which he was to be examined by the Government. The Court found that the relationship of attorney and client between the witness and petitioner had been established, and ruled that the witness would not be permitted to be questioned as to conversations with petitioner (169-172). Notwithstanding the urgings of counsel for petitioner that, under the circumstances, the witness was required to be excused without further questioning (172), the Court directed, over the objection and exception of petitioner, that the witness testify as to who retained him to appear for Barbara Pearson in Washington on or about July 11, 1942, and who paid his fee for

acting as her attorney, and to identify both Barbara Pearson and the person who retained him and paid his fee for representing her (210-211). In accordance with the ruling of the Court the witness then testified, in the presence of the jury, as to the details concerning his retention and identified the material witness as Barbara Pearson and petitioner as the person who retained him and paid his fee (214-216).

The case against petitioner was predicated upon circumstantial evidence of such character that the testimony of Buckley was its strongest point. The record was devoid of any evidence of either transportation by petitioner or the vital element of intent. The government was, therefore, most anxious to place before the jury Buckley's testimony concerning the circumstances and details of his retainer by petitioner so that the jury would know that petitioner and the material witness were in Washington at the same time; that the material witness was in custody of the police, and that petitioner had retained and paid an attorney to represent her, thereby establishing criminality on the part of the petitioner by inference. This was definitely violative of petitioners privilege against self-incrimination and the confidential relationship of attorney and client.

With the exception of those cases in which an attorney was consulted by a client for advice that would serve him in the commission of a fraud or a breach of law, no case has been found where an attorney was compelled to testify in a *criminal case in which his client was the defendant*, concerning the circumstances and purposes of his being retained, or the matters therein involved where those matters would affect the interest of the client.

The Court below (R. 367) and Trial Court, in making its ruling, relied on *People ex rel. Vogelstein* v. *Warden of the County Jail*, 150 Misc. 714, which, in turn, was predicated upon *United States* v. *Lee*, 107 Fed. 702. Both cases

were concerned with the refusal of attorneys, in the course of *grand jury investigations,* to disclose the names of their clients where it appeared that they had represented persons in the State and Federal Courts respectively, by whom they had not been retained. In each instance the attorneys claimed that privileged communications were involved. In directing the attorneys to disclose the names of their clients the Courts held that an attorney may not state that the relationship of attorney and client existed "and then leave that client mysterious, unknown and undefined. The Court has a right to know that the client whose secret is treasured is actual flesh and blood, and demand his identification, for the purpose, at least, of testing the statement which has been made by the attorney who places before him the shield of this privilege." *United States* v. *Lee, supra,* at p. 704.

Petitioner does not take issue with either the *Vogelstein* or *Lee* cases insofar as they hold that the relationship of attorney and client must be established before the claim of privilege may be asserted, but respectfully submits that neither case is authority for the proposition here involved and that even under those decisions the ruling of the Court in the case at Bar was erroneous and prejudicial.

The situation in the case at Bar was not analogous to those presented in the *Lee* and *Vogelstein* cases. There the "clients" were unknown and unnamed, and the disclosure was directed in order to ascertain whether or not bonafide relationship of attorney and client had been established. Here the Court had been fully informed by Buckley as to all the details and circumstances of his being retained by petitioner, and, as a result, the Court was satisfied and found that the relationship of attorney and client had been adequately established (170-173, 210-211). The question presented in the *Vogelstein* and *Lee* cases was not, therefore, here involved, and no purpose could be served by compelling the witness to repeat all the de-

tails of his retainer before the jury unless it was to prejudice petitioner in their minds by permitting incriminating evidence to be improperly presented to them.

The purpose of examining Buckley in the absence of the jury was to determine whether a bona fide relationship of attorney and client existed, and to keep from it any information concerning that relationship that might in any manner, tend to prejudice or incriminate petitioner. When that relationship, which was a question of law and not one of fact to be determined by the jury, was found by the Court to be a valid one, the witness was required to be excused.

The *Lee* and *Vogelstein* cases were both concerned with grand jury investigations and not criminal trials in which the "clients" were defendants, and where proof of the relationship of attorney and client might incriminate the "client". The Court, in the *Vogelstein* case, indicated that had that been the situation there a different conclusion would have been reached when it held that the attorney could not urge that disclosure of the relationship might tend to incriminate the client since "only the witness or party himself may urge that immunity" (p. 176). Petitioner here objected to any disclosure by Buckley and urged that he be excused without questioning (172, 210, 211).

It cannot be disputed that notwithstanding petitioner's objections, Buckley was compelled to give testimony that tended to incriminate petitioner on the very charge for which he was on trial. The effect of Buckley's testimony was to establish *that petitioner was in Washington at the same time as the material witness;* that he knew of her arrest and conduct there; and by his retainer of Buckley for and on her behalf to raise an inference that he was a beneficiary of her activities, thereby permitting the jury to presume criminality on the part of petitioner. Without this testimony no case could have been made out against

petitioner. The practice here indulged in by the Court has never found sanction in the law. In *Corpus Juris* (Vol. 70, Section 562) the law is stated to the contrary:

> "Thus the attorney will not be required to disclose the identity of his client except in an action or proceeding in which he purports to represent the client, and so the name of the client will be considered privileged matter where the circumstances of the case are such that the name of the client is material only for the purpose of showing an acknowledgment of guilt on the part of such client on account of the very offenses on account of which the attorney was employed, * * * ."

In the Matter of Shawmut Mining Co., 94 App. Div. 156, in which it was sought to have an attorney disclose the identity of his client in order to connect him with certain transactions, the Court held (p. 163):

> "We feel sure that under such conditions no case has ever yet gone to the length of compelling an attorney, at the instance of a hostile litigant, to disclose not only his retainer, but the nature of the transactions to which it related, when such information could be made the basis of a suit against his client. Upon the other hand we believe that a refusal to compel such disclosures is sustained by the principles laid down in Carnes *v.* Platt, 36 N. Y. Super. Ct. 361, 362, affirmed 59 N. Y. 405; Williams *v.* Fitch, 18 N. Y. 546, 551; Cherac *v.* Reinicker, 11 Wheat. 280, 6 L. Ed. 474."

See also: *Matter of Malcolm*, 129 App. Div. 226;
Matter of Traynor, 146 App. Div. 117;
Hyman v. *Corgill Realty Co.*, 164 App. Div. 140.

In *Ex Parte McDonough*, 149 P. 566, 170 Cal. 230, it was held that an attorney who had been employed by certain clients to represent them in matters connected with the investigation of election frauds, and who appeared to

defend three other individuals who were indicted, and to put up bail for one of the indicted men, could not be compelled to state to the grand jury the names of the clients who employed him to represent the indicted men and who furnished the cash for the bail.

The Court, in the case at Bar, in compelling Buckley to testify as to who retained him and paid his fee for appearing for Barbara Pearson in Washington on or about July 11, 1942, and to identify both Barbara Pearson and the person who retained him and paid the fee for representing Barbara Pearson (210), not only virtually destroyed the integrity of the privilege existing between attorney and client, but completely ignored the restrictions and admonitions of the Court in *United States* v. *Lee, supra.* In that case it was held, even under the circumstances there involved, the attorney should not be required to testify as to who paid his fee, the interest of the client in the litigation, and whether the client had retained him to protect his own interests thus limiting the testimony of the attorney to the name and address of his client. The Court cautioned the grand jury as to the use to which such information was to be put "lest the Court should appear to be unjust in compelling an attorney to reveal the identity" of his client. *U. S.* v. *Lee, supra,* pp. 704-5.

The questions propounded of the witness Buckley undoubtedly called for the disclosure of a privileged communication. The rule as to privileged communications is thus stated by Greenleaf (Evidence, 15th ed.), par. 237:

> "And in the first place in regard to professional communications, the reason of public policy, which excludes them, applies solely, as we shall presently show, to those between a client and his legal adviser; and the rule is clear and well settled, that the confidential counselor, solicitor, or attorney of the party can not be compelled to disclose papers delivered, or

communications made to him, or letters or entries made by him, in that capacity."

In the present case the question is not as to the existence or meaning of the rule but as to its application. This is well brought out in the case of *Chirac* v. *Reinicker,* 11 Wheat., 280. In that case the witness was asked the following question: "Were you retained at any time as attorney or counselor, to conduct the ejectment suit above mentioned on the part of the defendant, for the benefit of the said George Reinicker as landlord of those premises?" The Supreme Court, by Justice Story, held that the question was improper as calling for the disclosure of professional confidence. At page 294 the Court said:

> "The general rule is not disputed, that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purpose of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent. The real dispute in this case is, whether the question did involve the disclosure of professional confidence. If the question had stopped at the inquiry whether the witnesses were employed by Reinicker, as counsel, to conduct the ejectment suit, it would deserve consideration, whether it could be universally affirmed that it involved any breach of professional confidence. The fact is preliminary in its own nature, and establishes only the existence of the relation of client and counsel, and therefore might not necessarily involve the disclosure of any communication arising from that relation after it was created. But the question goes further. It asks, not only whether the witnesses were employed, but whether they were employed by Reinicker to conduct the ejectment for him, as landlord of the premises. We are all of opinion that the question, in this form, does involve a disclosure of confidential communications."

Circuit Judge L. Hand, in the case below, in his dissenting opinion stated: (R. 370)

> "On the other hand I attach no importance to the fact that he retained him in both capacities at the same time; the case stands as it would, if he had retained him for himself first. Yet, if he had done that, when he told him to appear for her, I think it was a communication between attorney and client, a step in his own defense; it may have been also a step in hers but that. I submit, is irrelevant. That direction to his own attorney in his own interest was as much a privileged communication as any direction would have been, made in the course of preparing for a trial; as much for example, as to tell one's attorney to interview a witness."

The ruling of the Court below on the admissibility of the testimony of Mr. Buckley was error. It violated a basic and fundmental rule that an attorney may not testify against his client and divulge confidential and privileged communications.

CONCLUSION.

This petition does not attempt to present to this Court the question wherein the Court below under existing circumstances abused its discretion and committed error in failing to call the material witness. Neither does it attempt to show wherein the trial Court erred in permitting the testimony of the Federal Bureau of Investigation Agent, contrary to the law laid down by this Court in *United States* v. *McNabb,* 318 U. S. 332, and *United States* v. *Mitchell,* 60 S. Ct. 896. The two questions submitted, are considered sufficient, to believe this Court will grant the petition for a writ of certiorari. The writ should be granted.

Respectfully submitted,

Roy St. Lewis,
Counsel for Petitioner.

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OPINION BELOW

The majority (R. 362–369) and dissenting (R. 369–370) opinions in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 7, 1944 (R. 371). The petition for a writ of certiorari was filed August 24, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The two questions upon which petitioner relies for the granting of certiorari (Pet. 17) are—

1. Did the trial judge err in permitting the jury to consider whether the transportation was not only for the purpose of prostitution but also "for any other immoral purpose"?

2. Did the trial judge err in holding that testimony by an attorney, called as a Government witness, that he was retained by petitioner to represent the woman transported after she had been arrested on a prostitution charge was not excludable as disclosing a privileged communication?

Two additional questions presented are—

3. Whether the testimony of an F. B. I. agent as to a statement made to him by petitioner should have been excluded as obtained in violation of the rule enunciated in *McNabb* v. *United States,* 318 U. S. 332.

4. Whether the trial court abused its discretion in refusing to call the woman transported as a court witness.

STATUTE INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

On May 24, 1943, petitioner was indicted in the United States District Court for the Southern District of New York in one count charging that on or about July 11, 1942, he wilfully transported one Barbara Jorman from New York City to Washington, D. C., for the purpose of prostitution, debauchery, and other immoral purposes, in violation of Section 2 of the Mann Act (R. 5). After a jury trial petitioner was convicted (R. 339) and was sentenced to imprisonment for three years (R. 340). Upon appeal to the Circuit Court of Appeals for the Second Circuit the judgment was affirmed, one judge dissenting as to the two principal questions presented by the petition for a writ of certiorari.

The evidence for the Government may be briefly summarized as follows:

For a considerable period of time prior to the transportation in question Barbara Jorman was a prostitute in and about New York City (R. 36–39, 222–225, 231–233, 236–246), and at least on one occasion petitioner took her to a house of prostitution in another city where she worked for a short time as a prostitute, leaving there, with petitioner's knowledge, because business was bad (R. 231–246). There is testimony that for a short time in February, 1942, she lived with petitioner in a rooming house in New York City (R. 248–249), and immediately prior to the transportation in question and after her return from Washington to New York City, Barbara lived with petitioner in his penthouse apartment (R. 13, 15–17, 23, 53–55, 57–60, 254).

On July 1, 1942, Barbara was arrested in New York City for practicing prostitution, and on July 7, four days before the transportation charged in the indictment, she was convicted, but her three months' sentence was suspended (R. 36–40). One evening shortly thereafter, the exact date not being fixed in the record, petitioner had two handbags and a steamer trunk carried from his apartment to his Packard automobile (R. 46–47). He had also spoken to a representative of the apartment building in which he lived with reference to subletting his apartment for a couple of months, but this could not be accomplished (R. 11, 30). On the morning of July 11, 1942, petitioner and Barbara

arrived at a hotel in Washington, D. C., in a Packard automobile, and petitioner registered Barbara and himself at the hotel as Mr. and Mrs. George Pearson, of Union City, New Jersey, taking a room with a double bed and paying for occupancy by two. The luggage taken from the Packard to this room was described by a hotel employee as consisting of one large suitcase and two smaller ones. Later, on the same day, petitioner and Barbara were transferred to a better room of the same type. (R. 85–87, 103, 107.) Precisely how long petitioner remained at the hotel is not disclosed, but he was seen in and about the hotel several times within the next few days (R. 88, 95, 105, 106; cf. R. 95, 110). Petitioner was absent from his apartment in New York City at least two weeks (see R. 16–18).

On the morning of July 15 Barbara was arrested in the hotel room after she had invited a Sex Squad detective into the room and asked him for five dollars (R. 153–154).[1] Barbara was taken to the Women's Bureau and booked for investigation (R. 159, 284). That evening one Buckley, an attorney, appeared at the Bureau to see Barbara, and on the next evening she was "released to Attorney Buckley" by order of the detective who arrested her (R. 159, 160, 284), on the condition, the detective testified, that she leave

[1] Apparently at this time petitioner had left the hotel as no men's effects were found in the room by the policeman and the woman had but a single bag (R. 163–164).

Washington immediately (R. 160; see also R. 167).[2]

On the night of August 29, 1942, Barbara was again arrested, together with 14 other prostitutes, in another Washington hotel (R. 157), and on the next day she was released without prosecution to another attorney who represented her on that occasion (R. 284). On November 17, 1942, she was arrested in New York City and pleaded guilty to a charge of prostitution (R. 173–175).

After petitioner was taken into custody on April 26, 1943, by an F. B. I. agent, he admitted to the agent that he had registered at the hotel in Washington with Barbara as husband and wife and said "he didn't see that that made any difference, and if we were checking hotels on him we would have to do a lot of checking, for he

[2] While Buckley testified that Barbara was released at his instance, he denied that she was placed in his custody, or that her release was secured upon the condition that she leave town (R. 212, 215, 219, 287). Buckley's testimony also disclosed that he was retained by petitioner to represent Barbara and that petitioner paid his fee (R. 215). On this occasion, according to Buckley's testimony, petitioner came to see Buckley in a Packard automobile (R. 217). We have disregarded Buckley's testimony that petitioner retained him to represent Barbara, in discussing the question whether the evidence was sufficient to establish that petitioner transported Barbara not only for the purpose of prostitution but also for the purpose of continuing his illicit relationship with her (*infra*, pp. 10–12), in view of petitioner's contention that, since Buckley was retained by petitioner at the same time to represent him, this testimony should have been excluded as a privileged communication, a contention which, however, we think, is without merit (*infra*, pp. 12–15).

had registered in numerous places with various girls" (R. 254–267). He also stated that he had a Packard automobile which was stolen while he was in the vicinity of Washington in the summer of 1942 (R. 267).

Petitioner, after his arrest, was taken to the Federal House of Detention in New York City pending his release on bail, where he met an acquaintance who was also confined on a Mann Act charge. In the course of their conversation, petitioner told this acquaintance that he had lived with Barbara for two years, which, apparently the witness understood to mean, also, that "she was working for him"; that Barbara had made thirty to forty dollars a night; that petitioner and Barbara had driven to Washington from New York City because she had been arrested in New York for prostitution and had gotten a suspended sentence and was out on probation; that in Washington they checked in at a hotel as man and wife; that he checked her in there "for the purpose of prostitution"; that he stayed overnight at the hotel and then left; and that later, after Barbara's arrest at the second hotel in Washington, Barbara called petitioner and he drove her back to New York City (R. 177–178, 199–201).

Petitioner did not take the stand in his own defense.

ARGUMENT

1. One of the grounds upon which petitioner relies as a basis for certiorari (Pet. 17), is his con-

tention (Pet. 6–10) that the theory of the prosecution at his trial was that he transported Barbara in interstate commerce for the purpose of prostitution; that therefore the trial judge by his instructions (R. 322–323) improperly allowed the jury to convict petitioner if it found that he transported her for an immoral purpose other than prostitution; and that, in any event, the evidence was insufficient to support a conviction on the theory that she was transported for some immoral purpose other than prostitution.

In claiming that a new theory was injected into the case by the court's instructions, petitioner overlooks the fact that the indictment plainly alleged that the interstate transportation was "for the purpose of prostitution, debauchery and other immoral purposes" (R. 5), and that the Government's proof (see *infra*, pp. 3–7) was directed at showing that petitioner's purpose was to get Barbara away from the New York police so that, unmolested, she could continue her illicit relationship with him and at the same time practice her vocation as a prostitute. In any event, the prosecutor's theory of the case is not significant when, as in this case, the indictment alleges and the proof establishes that an inhibited criminal transportation has dual forbidden purposes. Cf. *United States* v. *Hutcheson*, 312 U. S. 219, 229; *Prussian* v. *United States*, 282 U. S. 675, 680–681. As the court below said (R. 365–366), "the proper issues in a criminal case are whether the indictment

fairly charges a crime as defined by a federal statute and whether the proof, adduced in a fair trial, supports the indictment, not what the prosecutor's legal theories of the case may have been."

This is not a case in which the prosecutor and the trial judge had to be nice in their selection of theories. The statute penalized the transportation if it was for any immoral purpose, including prostitution and debauchery. The function of the jury was to determine whether the transportation had been for some immoral purpose. The trial judge in his charge merely defined the two types of immoral purposes which could have application under the evidence presented—prostitution and illicit personal sex relationship—leaving it to the jury to determine whether the transportation was motivated by any such purpose (R. 322–325). Petitioner does not contend that the evidence fails to establish that the transportation was for the purpose of prostitution. Indeed, inferentially at least, he concedes that a sufficient case in that respect was made out for the jury, and the dissenting judge in the court below felt so keenly about the strength of the Government's evidence with reference to the prostitution angle of the transportation that he deemed it appropriate to say that, while he thought a reversal was required, "The evidence of the accused's guilt was so strong that I feel some compunction in voting to reverse * * *" (R. 369). Consequently, even if, as the dissenting

judge thought (R. 370), the evidence was "too doubtful" to justify a conviction on the basis that petitioner transported Barbara to Washington for the purpose of continuing his illicit relationship with her, it cannot be assumed, certainly, that the jury, as intelligent men, disregarded the convincing evidence that the continuation of her activity as a prostitute motivated her transportation by petitioner and, in disregard of their instructions, founded their verdict upon a purpose which rested, to use the language of the dissenting judge, in the "merest speculation" (R. 370). The jury's verdict was, of course, a general and not a special one; it must be upheld if there was evidence to support it, as plainly there was. This obviously is not a case submitted to the jury on two alternative *legal* theories, one of which is unsound.

Moreover, while it is true that, justifiably, the prostitution phase of the case was accorded the greater emphasis at the trial, we cannot agree with the dissenting judge that under the evidence there was "no reasonable ground for supposing that [petitioner] was led to bring [Barbara] on except to live on her earnings"; that it was "almost certain that he would have taken her though he knew he was merely to drop her at the hotel and return to New York" (R. 370). This appraisal of the evidence ignores too many significant factors to pass unquestioned. The evi-

dence summarized in the Statement (*supra*, pp. 3–7) indicates: Petitioner had been living with Barbara for two years. Immediately before their trip to Washington, petitioner occupied a penthouse apartment in New York City with Barbara as man and wife. During this time she was arrested by the New York police and received a three-months suspended sentence in connection with which she was placed on probation. Four days later, after an unsuccessful attempt to sublet the apartment for several months, petitioner and Barbara arrived in Washington, where they registered at a hotel as man and wife and were assigned to and paid for a room designed for occupancy by two, to which they had their fairly considerable luggage carried. While it appears that petitioner did not remain at this hotel more than a day or two, the jury, we think, was entitled to infer from the testimony, that petitioner did not leave Washington at that time but, instead, remained in that city until Barbara's second arrest on August 29, when, after she had "called" him about her trouble, he drove her back to New York, resuming his residence with her as man and wife at their apartment. There is no evidence that Barbara again engaged in prostitution until over two months after her return to New York City, which was over a month after, presumably, her probation expired, when she was again arrested by the New York police. Certainly the jury was entitled

fairly to infer from this evidence that beside the prostitution motive for the transportation, petitioner was equally interested in continuing his illicit relationship with Barbara, so far as the practice of her vocation permitted, when he brought her to Washington.

2. The second ground upon which petitioner relies for certiorari is that the trial judge violated the privilege against disclosure of communications between attorney and client when he permitted the witness Buckley, an attorney, to testify that petitioner retained him to represent Barbara when she was arrested in Washington on July 15, 1942, after Buckley had advised the judge that he was at the same time retained to represent petitioner. The facts with reference to this contention, briefly, are:

Buckley was called as a Government witness. In response to a question whether any man in the courtroom had been to his office on July 15, Buckley advised the court that a question of confidential communication between client and attorney was involved. The court then excused the jury (R. 170–171) and conducted a preliminary inquiry into the facts. Buckley advised the trial judge, merely, that he was retained on July 15 to represent Barbara and petitioner.[3] After affording counsel an opportunity to argue the legal questions and to examine the law on the subject (R. 171–

[3] It was pursuant to Buckley's efforts that Barbara was released from custody (*supra*, pp. 5–6).

172), the court ruled, in reliance upon *People ex rel. Vogelstein* v. *Warden of County Jail,* 270 N. Y. Supp. 362, affirmed, 271 N. Y. Supp. 1059 (1934), that Buckley "should be directed to answer the questions as to who retained him to appear for Barbara * * * in the City of Washington on or about July 11 [15], 1942, in connection with the charge of prostitution against her, and who paid his fee as an attorney for acting as an attorney for Barbara * * *" (R. 210). He also ruled that Buckley would be permitted to testify that when he saw petitioner he was driving a Packard automobile. Petitioner's counsel expressly stated that he had no objection to the latter ruling and Buckley testified as it was understood he would, without objection or exception. (R. 210–211, 217.) Counsel's objection and exception extended only to Buckley's testimony that petitioner retained him to represent Barbara on July 15 and that petitioner paid his fee (R. 211, 215–216). Buckley was not permitted to testify whether he was retained to represent anybody else on that occasion (R. 216).

While there is involved the application of a well-settled principle, there is apparently no case directly in point. According to the better authorities, an attorney, it would seem, may be asked whether, in representing a client he ~~has represented~~ was actually retained by someone other than such client, and this regardless of whatever damage may inhere in

such a disclosure. That question is regarded as purely preliminary to an invocation of the privilege. That which occasioned the retainer may not be inquired into. (See *People ex rel. Vogelstein* v. *Warden of County Jail, supra; United States* v. *Lee,* 107 Fed. 702 (C. C. E. D. N. Y.); but cf. *Ex Parte McDonough,* 170 Calif. 230 (1915).)[4] However, unlike in the instant case, it does not appear that in the *Vogelstein* and *Lee* cases the one who did the retaining was urging that revelation of the retainer resulted in the disclosure of something which occurred in the course of an attorney-client relationship.

The dissenting judge in this case was of the opinion that Buckley's testimony was inadmissible because petitioner's simultaneous retention of Buckley to represent Barbara as well as himself was a "step in his own defence" (R. 370). The weak spot in the dissenting judge's argument is, we believe, in his premise. The burden of showing the facts which would warrant the exclusion of the testimony was, of course, upon the petitioner. The testimony was relevant and, unless it violated the privilege, was competent. All that was presented to the trial judge were the bare facts that Buckley was retained to

[4] This decision is criticized in the *Vogelstein* decision, *supra*, and by Wigmore, who has collected the authorities dealing generally with disclosure of the identity of the client. (See Wigmore on Evidence, 3d ed., vol. VIII, sec. 2313, pp. 607–610.)

represent both the petitioner and Barbara. Whether it did or not, there was no showing that the retention of Buckley to represent Barbara was in any way related to petitioner's retention of Buckley to represent himself. We do not know, as the majority points out (R. 367) for what purpose, even, petitioner retained Buckley to represent himself. For aught that appears, petitioner may have retained Buckley to represent Barbara to secure her release from the police in order that she could resume her activity as a prostitute, as the evidence shows she did.[5] Or there may have been other factors wholly disconnected with petitioner's retention of Buckley as his attorney which motivated petitioner's retention of Buckley to represent Barbara. As there is no basis, upon the showing made in this record, for the premise upon which the dissenting judge builds his argument that petitioner's direction to Buckley to represent Barbara was a privileged communication, the trial court, we submit, did not commit error in permitting Buckley to disclose the direction.

Moreover, the dissenting judge attaches to the testimony a weight which we do not think it has when the evidence is viewed as a whole. It is difficult to reconcile his conception of the effect of the testimony with his compunction in voting to reverse because of the strength of the evidence of

[5] As has been indicated (*supra*, p. 6), the evidence discloses that she was arrested in Washington a little over a month later upon another charge of prostitution.

the accused's guilt. The testimony was introduced undoubtedly to show the close relationship existing between petitioner and Barbara but, as is apparent from the evidence summarized in the Statement, that as well as the other factors which so strongly fastened guilt upon petitioner, were abundantly established by evidence unexceptionable in character. The testimony did not, we submit, result in prejudicial error, even if it be assumed that it should not have been admitted.

3. Petitioner asserts (Pet. 5, 6) that his admission to an F. B. I. agent prior to his arraignment that he had registered at a hotel in Washington with Barbara was admitted in evidence in violation of the rule laid down in *McNabb* v. *United States,* 318 U. S. 332, but he does not argue this point or rely upon it as a ground for certiorari (Pet. 17). There is clearly no merit in the contention. The record reveals neither inexcusable detention for the purpose of illegally extracting evidence from the accused nor the successful extraction of any inculpatory statements by continuous questioning for many hours under psychological pressure.

The facts related by the F. B. I. agent on preliminary examination out of the presence of the jury show (R. 254–266): Arraignment was had within five hours after the agent had requested petitioner to accompany him to the F. B. I. office for questioning. That delay was occasioned by the absence of the Assistant United States At-

torney from his office and the necessity of awaiting the arrival of petitioner's attorney and the calling of the case by the United States Commissioner. In the interim petitioner had been advised that he was not required to answer any questions and he replied (R. 262) he "wouldn't answer unless he wanted to." "Most of the time he [petitioner] was telling about picking horses, how it was done. We weren't asking about violations at that time. We asked some questions and he would answer, and some he would not, and then he talked about gambling schemes. It was not a continuous question[ing] about any white slave violation" (R. 264). Petitioner's oral statement which was brought out at the trial was made after petitioner had talked with his attorney on the telephone and was awaiting his arrival at the United States Commissioner's office. The case is clearly outside of the *McNabb* case as elucidated in the later decision in *United States* v. *Mitchell,* 322 U. S. 65.

4. The final contention of petitioner, likewise unargued and not relied upon as a certiorari ground (Pet. 17), is that the trial judge abused his discretion in refusing to call Barbara as a court witness when both sides failed to do so (Pet. 4, 5). Clearly, as the court below held (R. 367), "The judge was not obliged to call the woman, whom neither the prosecution nor the accused put on the stand. She was equally available to the defense; and if they called her, they would not

have been in any way concluded by what she said, though, of course, it would have been extremely damaging if she proved hostile. True, they could not impeach her credibility once they had called her, but there is no reason to suppose that they could not find out what she would say. The judge might indeed have called her to the stand, had he thought best; but the notion that he must so far have taken a hand in the trial is wholly untenable."

CONCLUSION

The case was properly decided below, and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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